(9)

No. 94-500

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

ERICH E. AND HELEN B. SCHLEIER,

Respondents

**On Writ of Certiorari To The
United States Court of Appeals
For The Fifth Circuit**

BRIEF *AMICUS CURIAE* OF PAN AM PILOTS TAX GROUP (NUMEROUS PAN AM PILOTS WHO PARTICIPATED IN THE SETTLEMENT OF AN ADEA CLASS ACTION LAWSUIT AGAINST PAN AMERICAN WORLD AIRWAYS) IN SUPPORT OF RESPONDENTS.

ROSEN, BIEN & ASARO
SANFORD JAY ROSEN
Counsel of Record
THOMAS NOLAN
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

27p

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

STATUTES

LEGISLATIVE HISTORY

TREATISES AND LAW REVIEW ARTICLES

INTEREST OF *AMICI CURIAE*

Amici are close to 100 pilots who participated in the settlement of an EEOC enforcement lawsuit against Pan American World Airways, asserting violations of the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 621 *et seq.*[1/] The settlement was approved by the United States District Court for the Northern District of California in *EEOC v. Pan American World Airways, Inc.*, 1988 WL 224232, 52 Fair Empl. Prac. Cas. (BNA) 929 (N.D. Cal. June 17, 1988) (No. C-81-3636 RFP, C-81-4590 RFP) (settlement for $17.2 million in damages to the pilot claimants, injunctive relief, and additional money for attorneys' fees for claimants' private attorneys, just before closing argument). The Ninth Circuit sustained the settlement against a challenge from excluded objectors. *E.E.O.C. v. Pan American World Airways, Inc.*, 897 F.2d 1499 (9th Cir. 1990).

Since the *Pan Am* settlement, members of the "class" have been subject to tax audits and other IRS enforcement actions that make the outcome of the instant case critical to their interests.

SUMMARY OF ARGUMENT

Focusing on the remedies available under a given statutory scheme is not a consistent or reliable way of determining whether a given cause of action is sufficiently "tort-like" to qualify for exclusion from taxable income under § 104 (a)(2) of the Internal Revenue Code. A far more useful and accurate approach would be to focus broadly on the statute as a whole, looking to its nature and

---

[1/] Letters of consent to the filing of this Brief have been lodged with the Clerk of the Court, pursuant to Rule 37.3.

remedial purposes. This broader approach is the approach advocated by Justice O'Connor in *United States v. Burke*, 504 U.S. ___, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) (O'Connor, J. dissenting, joined by Thomas, J.). The Court should reconsider her approach, in light of the developments since *Burke*. Certainly it should not extend the holding of *Burke* unnecessarily to cause damages under the ADEA to be taxed.

ARGUMENT

I. The Majority's Approach in *United States v. Burke* Is Too Narrowly Tailored to The Facts In That Case To Provide A Rule Of General Application For The Analysis of Taxability Issues Under § 104 (a)(2) And The Court Should Reconsider the *Burke* Approach In Light of The Developments Since *Burke*.

> Focusing on remedies, it seems to me, misapprehends the nature of the inquiry required by § 104(a)(2) and the IRS regulation. The question whether Title VII suits are based on the same sort of rights as a tort claim must be answered with reference to the nature of the statute and the type of claim brought under it.

United States v. Burke, 504 U.S. ___, 112 S.Ct. 1867, 1878, 119 L.Ed.2d 34, 53 (1992) (O'Connor, J. dissenting, joined by Thomas, J.).

At issue in this case is the proper manner in which to answer what at first appears to be a relatively simple legal question: Are the damages awarded under a given statutory scheme sufficiently tort-like to qualify to be excluded

from taxable income under § 104(a)(2) of the Internal Revenue Code and the corresponding Treasury Regulations?

The majority approach in *Burke* was to answer this question by looking to the range and type of remedies available under a given statutory scheme (in that case the pre-1991 version of Title VII of the Civil Rights Act of 1964) rather than the nature and purposes of the statute itself. Amici have studied the briefs of the Petitioner and Respondent (in draft) in this case and are persuaded that, even applying the majority's analysis in *Burke*, all ADEA damages are "tort-like" and are wholly excludable from taxable income pursuant to § 104(a)(2).

There is no clear-cut, common sense reason, however, why an analysis of the question "are the damages tort-like enough" should be limited to, or primarily based upon, an analysis of the available remedies. The majority in *Burke* appears to have placed undue stress on that approach. *See*, *Burke*, 112 S.Ct. at 1871 (remedies "figure prominently in the definition and conceptualization of torts."); *id.* at 1872, n. 7 ("The concept of 'tort' is inextricably bound up with remedies").[2/]

One possible justification for the majority approach could be that the remedial scheme of a statute is an indicator of the nature of the injury being addressed, and that the injury itself, thus correlated, is a simple indicator of the tort-like quality of the statute. *See id.* at 1873 (pre-1991 Title VII backpay redresses "legal injuries of an economic character" and thus is essentially contractual in nature.) However, tort remedies also redress economic injuries, and

---

[2/] Of course, as explained in Respondents' Brief, the majority in *Burke* was almost equally impressed and reliant upon the lack of a jury trial in the pre-1991 Title VII statutory scheme.

the Court's opinion in *Burke* seems to be focused more on the range of remedies than the nature of the injury being redressed by a given remedy. *See id.* at 1873 ("the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes as well.")

Upon closer examination it becomes evident that the correlation between a given remedial scheme and the nature of the injury redressed is uncertain and unreliable. The remedial schemes of Title VII, in its pre-1991 and post 1991 formulations, provide compelling evidence of this problem. Furthermore, frequently the same injury is wholly redressable under competing theories of liability that have different remedial schemes. *See, e.g.*, Prosser and Keeton, *Handbook Of The Law Of Torts* (5th ed. 1984) at 656, 657 (Explaining that "misfeasance or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and other tangible things" using the example "when a patient contracts with a physician for medical treatment and the physician is guilty of negligence in diagnosis or treatment, there is liability on a tort theory as well as on a contract theory"); *id.* at 657 (explaining that in the aforementioned situation there "is both a breach of an implied promise and a breach of a duty imposed by law.").

A second possible justification for using judicial scrutiny of remedies as the primary tool for categorizing damage awards under § 104(a)(2) could be for the sake of judicial economy: an analysis of the remedies available would appear to be, at first blush, a relatively simple, consistent way of answering the question "is it tort-like enough to qualify for exclusion?"

The problem with this justification becomes clear from a review of decisions interpreting §104(a)(2) in the aftermath of this Court's decision in *Burke*, as the Tax Court and the various Circuit Courts have struggled to apply the majority approach outside the pre-1991 Title VII context. The fact that the courts have come up with different answers to the apparently simple question "is it tort like enough?" reveals that determining whether the remedies are sufficiently tort-like is not so easy a question. References as to the proper categorization of liquidated damages illuminate these difficulties. *Compare, Downey v. Commissioner*, 100 T.C. 634, 636 (1993) ("Liquidated damages under the ADEA serve to compensate the victim of age discrimination for certain non-pecuniary losses") and *Thompson v. Commissioner*, 866 F.2d 709, 712 (4th Cir. 1989) (liquidated damages awarded under the Equal Pay Act are both punitive and compensatory and "[a]s such, the liquidated damages award constituted compensation received through a tort or tort-type action for personal injuries") with *Downey v. Commissioner*, 33 F.3d 836, 840 (7th Cir. 1994) ("whatever the appropriate characterization of ADEA liquidated damages . . . as a matter of law they do not compensate for the intangible elements of a personal injury" and are therefor not tort-like).

To the limited extent that courts are able to agree whether ADEA liquidated damages have a compensatory purpose from the victim's standpoint, they are still unable to agree upon the proper characterization of those damages. *Compare, Schmitz v. Commissioner*, 34 F.3d 790, 794 (9th Cir. 1994) (ADEA liquidated damages compensatory and tort-like because they "compensate victims for damages which are too obscure and difficult to prove") with *Downey v. Commissioner*, 33 F.3d 836, 840 (7th Cir. 1994) (ADEA liquidated damages "as the name implies, compensate a party for those difficult to prove losses that often arise from a delay in the performance of obligations — as

a type of contract remedy."). *See*, Prosser, *Handbook of the Law of Torts* 635 (3rd ed. 1964) ("The relation between the remedies in contract and tort presents a very confusing field, still in the process of development, in which few courts have made any attempt to chart a path."); Prosser and Keeton, *Handbook of the Law of Torts* 655 (5th ed. 1984) ("the distinction between tort and contract liability, as between parties to a contract, has become an increasingly difficult distinction to make.")

The problem is that ADEA liquidated damages, like many other remedies, cannot be exclusively categorized as either a contract or a tort remedy. *See Burke*, 112 S.Ct at 1877-1878 (Souter, J. concurring) (although "there are good reasons to put a Title VII claim on the tort side of the line" it is also true that "Title VII's ban on discrimination is easily envisioned as a contractual term implied by law" and "[i]n sum, good reasons tug each way."). *But see, Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) ("Congress also intended liquidated damages [under the ADEA and elsewhere] to serve as compensation for a discharged employee's nonpecuniary losses arising from the employer's willful misconduct"); H. Rept. 95-950 (Conf.) at 13 (1978) reprinted in 1978 U.S. Code Cong. & Admin News 528, 535 ("liquidated damages are calculated as an amount equal to the pecuniary loss which compensate the aggrieved part for non-pecuniary losses arising out of a willful violation of the ADEA").

As it turns out, the determination of what is and is not a tort is a difficult matter that has historically troubled legal scholars. In the introduction to their *Handbook of the Law of Torts* (5th ed. 1984), Prosser and Keeton note that "a really satisfactory definition of a tort has yet to be found" and then spend the next four pages provisionally adopting and then discarding as inadequate various definitions of a

tort. *See* Prosser and Keeton, *Handbook of the Law of Torts* at 1-5 (5th ed. 1984).

Some scholars have suggested that the distinctions between tort and contract law that were carved out in the nineteenth century are highly artificial, and particularly hard to maintain given the present similarities between tort remedies and contract remedies:

> Until the general theory of contract was hurriedly run up late in the nineteenth century, tort has always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again. . . . Classical contract theory might well be described as an attempt to stake out an enclave within the general domain of tort. . . . We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.

G. Gilmore, *The Death Of Contract* at 87-88 (1974).[3/]

[3/] *See* Holmes, *The Path of the Law*, 10 Harv. L. R. 457 (as reprinted in Collected Legal Papers of Oliver Wendell Holmes (1920) at 175):

> The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it -- and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.

See also, Posner, *Economic Analysis of Law* (1986) at 81 (defining contract law functionally, as concerned with deterring "people from

Prosser has an easier time in attempting to distinguish tort from contract, but when he does so, it is *not* by focusing on remedies, rather he focuses on the nature of the interest protected:

> The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily the will or intention of the parties . . . Contract actions are created to protect the interest in having promises performed.

Prosser, *Handbook of the Law of Torts* at 634 (3rd ed. 1964). *See* Prosser and Keeton, *Handbook of the Law of Torts* at 1, n. 2 (5th ed. 1984) (quoting Lee, Torts and Delicts, 27 Yale L. J. 721, 723 (1918) for the idea that "a tort is usually defined negatively in such terms as to distinguish it from breach of contract"); Posner, *Economic Analysis of Law* at 147 (1986)("[w]rongs that subject the wrongdoer to a suit for damages by the victim, other than breaches of contracts, are called torts."). *See also*, Prosser and Keeton, *supra*, at 6 ("So far as there is one central idea it would seem to be that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others."); Black's Law Dictionary at 1489 (6th ed. 1990) (defining tort: "There must always be a violation of some duty . . . and generally such duty must arise by operation of law and not by mere agreement of the two parties.")

---

behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and make costly self-protective measures unnecessary."); *id.* at 105-123 (discussing the broad range of available contract remedies).

The narrow focus on remedies adopted by the majority in *Burke* may have functioned as an analytical tool in that case, but is poorly tailored to more general application. Amici urge the Court to take advantage of the instant case as an opportunity to adopt an approach that looks more broadly to the purposes of the statute under which the damages are awarded in an attempt to determine whether the action is more tort-like or more contract-like. This is the approach favored by Justice O'Connor in her dissent in *Burke*. *See Burke*, 112 S.Ct at 1878 ("In my view, the remedies available to Title VII plaintiffs do not fix the character of the right they seek to enforce. The purposes and operation of Title VII are closely analogous to those of tort law, and that similarity should determine the excludability of recoveries for personal injury under 26 U.S.C. § 104(a)(2).").

Such an approach is also favored by the vast majority of Circuit Court panels looking at the issue prior to *Burke*. *See, Thompson v. Commissioner*, 866 F.2d 709, 711 (4th Cir. 1989) ("In determining whether an award of damages is excludable from gross income, the nature of the cause of action and the injury to be remedied must be identified."); *Rickel v. Commissioner*, 900 F.2d 655, 661 (3rd Cir. 1990) (endorsing the view that "we must look to the nature of the claim and not to the consequences that result from the injury."); *Pistillo v. Commissioner*, 912 F.2d 145, 149 (6th Cir. 1990) ("Reviewing the nature of Pistillo's claim, we conclude that his age discrimination lawsuit is analogous to the assertion of a tort-type right to redress personal injuries."); *Redfield v. Insurance Co. of North America*, 940 F.2d 542 (9th Cir. 1991) ("we adopt the reasoning of the Third and Sixth Circuits and hold that age discrimination damages are tort-type recoveries for personal inju-

ries."). Such an approach is also consistent with this Court's focus in *Burke* as to whether or not a statutory scheme provides for a jury trial. *See Burke*, 112 S.Ct. at 1872-1874.

In the instant case, such a broad approach clearly favors the determination that ADEA is sufficiently tort-like to justify exclusion of ADEA damages from gross income under § 104(a)(2).

II. Justice O'Connor's Approach in *United States v. Burke* Offers A Pragmatic And Cogent Approach to The Analysis of Taxability Under § 104(a)(2)

Justice O'Connor's approach to taxability issues under § 104(a)(2) accords with the approach of those scholars who define torts (and distinguish torts from contract) functionally:

> Title VII makes employment discrimination actionable without regard to contractual arrangements between employer and employee. Functionally, the law operates in the traditional manner of torts: courts award compensation for invasions of a right to be free from certain injury in the workplace. Like damages in tort suits, moreover, monetary relief for violations of Title VII serves a public purpose beyond offsetting specific losses. . . . It is irrelevant for the purposes of Title VII that an employer profits from discriminatory practices; the purpose of liability is not to reassign economic benefits to their rightful owner, but to compensate employees for injury they suffer and to "eradicat[e] discrimination throughout the economy."

United States v. Burke, 112 S.Ct. 1867, 1878 (1992) (O'Connor, J. dissenting).[4/] The present case requires the Court to look at the nature and scope of ADEA, as well as its remedial structure, in order to determine whether damages awarded under ADEA are sufficiently "tort-like" to qualify for exclusion under § 104 (a)(2).

By its terms, the purpose of the ADEA is to "promote employment of older persons based upon their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621 (b). Thus, the ADEA is similar to tort law in its combination of goals: like tort law, ADEA is designed both to remedy harm suffered by discrete individuals *and* to further important social goals. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) ("As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies"); *McKennon v. Nashville Banner Pub. Co.*, 63 USLW 4104, 4105 (U.S., January 24, 1995) ("The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions.").

A review of the legislative history of the ADEA reveals a tort-like concern with social policy and a tort-like intention to compensate the individual victims of socially

---

4/ *See also, Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J. concurring) ("Like the common law of torts, the statutory employment 'tort' created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole . . . . The second goal is to 'make persons whole for injuries suffered on account of unlawful employment discrimination.' [*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)] at 418.")

undesirable behavior. Senator Javits' remarks upon the introduction of the ADEA to the full Senate in 1967 make clear the social policy goals of the legislation:

> [I]t is a sad day indeed when a man realizes that the world has begun to pass him by; that happens to us all sooner or later. But it is surely a much greater tragedy for a man to be told, arbitrarily, that the world has passed him by, merely because he was born in a certain year or earlier, when he still has the mental and physical capacity to participate in it as energetically and vigorously as anyone else. . . . there is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs. The answer to this kind of popular misconception is obviously a broad based program of information and education, and that is exactly what S. 830 provides for. At the same time, the experience of the states has shown that information and education alone are not enough; they must be coupled with the availability of formal remedial procedures to compel compliance with the law. . . .

113 Cong. Rec. 31254 (Nov. 6, 1967) (Remarks of Sen. Javits); *See also*, 113 Cong. Rec. 34741 (Remarks of Rep. Steiger) (endorsing the view that "the hiring policies of many employers are rooted in past prejudices and practices" and thus highlighting the need for the ADEA).

The compensatory purpose of the ADEA is underscored in the legislative history of the 1978 amendments to the act:

> The Supreme Court recently decided that a plaintiff is entitled to a jury trial in ADEA actions for lost wages, but it did not decide whether there is a right to a jury trial on a claim for liquidated damages *Lorillard v. Pons*, [434 U.S. 575,] 98 S.Ct. 866 (1978). Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-84 (1942).

H. Rept. 95-950 (conf.) 13, 14 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 535.

Another clear indication that the ADEA is tort-like rather than in the nature of an implied contract term is the fact that it protects individuals who have not yet entered into a contractual relationship. *See, Rickel v. Commissioner*, 900 F.2d 655, 662 (3rd Cir. 1990) (noting that the scope of ADEA "goes beyond the mere employer-employee context, protecting individuals from various forms of discrimination even if they are not yet in a contractual relationship, e.g. refusal to hire contexts" and concluding "[t]hus, focusing on the nature of the claim, we are convinced that the taxpayer's discrimination suit under the

ADEA was analogous to the assertion of a tort type right to redress personal injury.").

Moreover, numerous cases have recognized that the age discrimination is fundamentally akin to personal injury. *Pistillo v. Commissioner*, 912 F.2d 145, 150 (6th Cir. 1990) ("The reality . . . is that Pistillo did suffer invidious age discrimination. Pistillo endured his employer's indignities, insults and age discrimination; suffered a dignitary tort; and was personally injured."); *Rickel v. Commissioner*, 900 F.2d 655, 663 n. 13 (3rd Cir. 1990) ("age discrimination . . . is a personal injury and an ADEA action to redress that injury is more like the assertion of a tort type right" than like contract); *Jay v. International Salt Co.*, 868 F.2d 179, 180 (5th Cir. 1989) (holding that for purposes of Louisiana statute of limitation, violation of state age discrimination law is a tort); *Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 562 (5th Cir. 1979) ("An action based upon the federal antidiscrimination statutes is essentially an action in tort.").

III. Even If The Court Reaffirms Its *Burke* Analysis, That Analysis Requires The Exclusion Of Any ADEA Damages From Gross Income.

In her brief Petitioner argues that a proper analysis of the remedies available under ADEA shows that the damages should be included in gross income. Petitioner's position is mistaken.

The ADEA, in contrast to pre-1991 Title VII, affords plaintiffs a relatively broad and tort-like range of remedies. Many of the ADEA's substantive provisions closely parallel the language, design and purposes of Title VII, *see, e.g., O'Connell v. Ford Motor Company*, 11 Fair Empl. Prac.

Cas. (BNA) 1471, 1472 (E.D. Mich. 1975) (because ADEA provisions so similar to Title VII, standards developed under Title VII may be used in ADEA cases). However, the ADEA is not a clone of Title VII. For example, this Court recently underscored the differences between Title VII and the ADEA in the context of disparate treatment and disparate impact. *Hazen Paper v. Biggins*, 507 U.S. ___, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338, 346 (1993) ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA. . . and we need not do so here."); *id.*, 113 S.Ct. 1701 at 1710 (Kennedy, J. concurring, joined by Rehnquist, J. and Thomas, J.) ("[T]here are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."); *see also, Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting "significant differences" in the "remedial and procedural provisions" of Title VII and the ADEA). The point is this: Recognition of the differences in the two statutory schemes makes it necessary for the courts to address squarely in each significant instance whether the same approach applies equally to pre-1991 Title VII and the ADEA.

Significantly, in contrast to the pre-1991 Title VII, the ADEA imports its enforcement mechanisms from the Fair Labor Standards Act ("FLSA"). *See* 29 U.S.C. §626 (b), incorporating 29 U.S.C. §§ 211 (b), 216 (b), 216 (C), 217, 226 (b) and 226(c). Under the FLSA provisions which supply much but not all of the ADEA's remedial scheme, a plaintiff may recover unpaid wages plus an amount equal to the unpaid wages in liquidated damages. 29 U.S.C. 216 (b). The ADEA by contrast only permits the awarding of liquidated damages "in cases of willful violations of this chapter." 29 U.S.C. § 626 (b). Moreover, the remedial structure of the ADEA includes more than just the FLSA backpay and liquidated damages provisions.

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief as may be appropriate* to effectuate the purposes of this chapter, including without limitation judgements compelling employment, reinstatement, or promotion, of enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626 (b) (emphasis added). There is, moreover, no parallel to the sweeping language of this section anywhere in the Title VII remedial scheme for employment discrimination. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("[C]ongress specifically provided for both 'legal or equitable relief' in the ADEA, but did not authorize 'legal' relief in so many words under Title VII"); *see* 42 U.S.C. § 2000e-5(g)(1) (allowing "any other equitable relief as the court deems appropriate" but containing no similar catch-all provision for legal relief.).

It is also significant that while arguing for the includability of ADEA damages in taxable income under the rationale of *Burke*, Petitioner ignores the presence of the jury trial in the ADEA remedial scheme and overlooks the similarity between the ADEA and the post-1991 Title VII which the Court in *Burke* took pains to distinguish from pre-1991 Title VII. *See Burke*, 112 S.Ct. 1867, 1874 n. 12 (discussing the 1991 amendments and stating that "we believe that Congress' decision to permit jury trials and compensatory and punitive damages under the amended act signals a marked change in its conception of the injury redressable by Title VII.")

There are two basic arguments that have been advanced in support of the proposition that ADEA liquidated damages are not excludable from taxable income under

§ 104(a)(2). The first is that because they are exclusively punitive, ADEA liquidated damages should not be excluded as they are given on account of willful misconduct and not on account of personal injuries. The second argument admits that ADEA liquidated damages are also compensatory, but insists that because they merely compensate for loss of prejudgement interest, they do not compensate for personal injury and rather are a sort of contract remedy. Both arguments must be rejected because they view the purposes of the ADEA liquidated damages remedy too narrowly.

First, Petitioner argues that ADEA liquidated damages are punitive. That position relies on this Court's observation in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." However, in *Thurston*, the Court did not preclude the possibility of other purposes or functions of ADEA liquidated damages. That question was in no way before the Court in *Thurston*. Indeed, it is particularly significant that this Court observed less than two weeks ago in *McKennon v. Nashville Banner Pub. Co.*, 63 USLW 4104, 4106 (U.S., January 24, 1995) that the "private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA."

Statutes are capable of multiple purposes, and to say that punishing wrongdoing is one purpose is not to rule out the possibility that the statute is also intended as compensation to the victim of the wrongful conduct. *Powers v. Grinnel Corporation*, 915 F.2d 34, 41 (1st Cir. 1990) ("*Thurston* simply observes that liquidated damages serve a punitive function. *Thurston* did not concern, and does not intimate, whether liquidated damages under the ADEA simultaneously serve the compensatory function of indemni-

fying employees for prejudgement delays in recouping backpay"). *Schmitz v. Commissioner*, 34 F.3d 790, 793 (9th Cir. 1994) (ADEA "liquidated damages serve to compensate the victim of age discrimination for certain non-pecuniary losses and also serve a deterrent or punitive purpose.") (citations and internal quotation marks omitted).

There is ample reason to attribute a compensatory as well as a punitive purpose to the ADEA liquidated damages provision. *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) ("Congress also intended liquidated damages to serve as compensation for a discharged employee's nonpecuniary losses arising from the employer's willful misconduct"); H. Rept. 95-950 (Conf.) at 13 (1978), reprinted in 1978 U.S. Code Cong. & Admin News 528, 535 ("liquidated damages are calculated as an amount equal to the pecuniary loss which compensate the aggrieved part for nonpecuniary losses arising out of a willful violation of the ADEA").

Second, Petitioner and some courts argue that even if ADEA liquidated damages are compensatory as well as punitive, they compensate only for the delay in payment, thus in effect replacing prejudgement interest and not compensating for injuries resulting from personal injury as required for exclusion under § 104 (a)(2). *See*, Petitioner's Brief at 18-19; *Downey v. Commissioner*, 33 F.3d 836, 840 ("whatever the appropriate characterization of ADEA liquidated damages . . . as a matter of law they do not compensate for the intangible elements of a personal injury" and are therefor not excludable under § 104(a)(2).).

However, the assertion that ADEA damages do not compensate for the intangible elements of personal injury as well as for any loss of prejudgement interest is simply mistaken. H. Rept. 95-950 (conf.) 13, 14 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 535

(quoting *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-84 (1942), for the proposition that "an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are 'too obscure and difficult of proof for estimate other than by liquidated damages.'") *See also, e.g., Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 6 (1st Cir. 1989) ("The rule [barring recovery for liquidated damages and prejudgement interest] was based upon the view that Congress intended for liquidated damages under the ADEA to be compensatory in nature and to cover, *among other things*, loss due to delay — precisely what prejudgement interest protects against." (emphasis added)). In addition, Congress chose not to call the ADEA liquidated damages "prejudgement interest." Moreover, it is in the nature of any liquidated damages remedy to substitute for difficult to calculate losses, and prejudgement interest is not difficult to calculate.

Other evidence that the liquidated damage provision compensates for more than loss of prejudgment interest — evidence that it compensates in part for the emotional distress that results from being victimized by intentional age discrimination — comes from the fact that when the various circuit courts disallowed recovery for emotional distress damages under ADEA they did so partly on the grounds that the statutory scheme in place absent such provisions was sufficient to make victims of age discrimination whole.

The theory under which separate emotional distress damages might have been allowed under the ADEA was not altogether implausible. The notion was that the statutory language of 29 U.S.C. § 626 (b) conferring jurisdiction "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including

without limitation..." was broad enough to encompass emotional distress damages. A number of district courts initially allowed such damages on the grounds that they were "appropriate to effectuate the purposes" of ADEA. *See, e.g., Rogers v. Exxon Research and Engineering Company*, 404 F.Supp 324, 327 (D.N.J. 1975) (arguing that "the ADEA essentially establishes a new statutory tort," pointing out that "the Supreme Court has also held that other civil rights statutes 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,'" and listing cases in support of the latter proposition) (citations ommitted), *rev'd*, 550 F.2d 834 (3rd Cir. 1977), *cert denied*, 434 U.S. 1022 (1978).

Although the circuit courts uniformally disallowed the recovery of emotional distress damages under the ADEA, they did so in part on the basis of the belief that the remedial scheme in place without such additional provisions was sufficient to make victims of invidious age discrimination whole. *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1296 (4th Cir. 1979) (no pain and suffering damages under ADEA); *Vasquez v. Eastern Airlines, Inc.*, 579 F.2d 107, 112 (1st Cir. 1978) ("inferring a damage remedy is not necessary to guarantee effectuation of the ADEA's broad goals. . . While we find that the statutory language, coupled with congressional purpose, indicates the correctness of limiting damages to those provided by the FLSA, we do not suggest permanently foreclosing remedies which might prove essential to guarantee the integrity of the statute."); *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1038-39 (5th Cir. 1977) ("To be sure, the Congress was not unaware of, or insensitive to psychological and other damages incident to age based employment discrimination. It is more logical to infer from the remedial enforcement scheme contemplated by the Act legislative intent to prevent such injuries though compliance therewith, and in

the event of non-compliance, prompt reinstatement, promotion or other equitable relief coupled with lost wages, and liquidated damages, if appropriate, rather than to read into the superficial phrase 'Legal Relief' wrenched from context, an intent to authorize the recovery of general damages after such injuries have been inflicted."), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Eng'r. Co.*, 550 F.2d 834, 840 (3rd Cir. 1977) ("Congress saw fit to restrict the penalty provisions of the Act to doubling the amount of lost earnings. To allow psychic distress awards in addition would in a very real sense thwart the limitation Congress thought advisable to impose."), *cert. denied*, 434 U.S. 1022 (1978).

For all of these reasons, the dual nature of the liquidated damages awards under the ADEA supports a finding that ADEA liquidated damages, as well as ADEA damages more generally, are "tort-like" and therefor properly to be excluded from taxable income pursuant to § 104(a)(2).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Rosen, Bien & Asaro
Sanford Jay Rosen
Counsel of Record
Thomas Nolan
155 Montgomery St., 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

Dated: February 4, 1995